(3)

No. 83-2139

Office - Supreme Court, U.S
FILED
OCT 4 1984
ALEXANDER L. STEVAS
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN D. ROCKEFELLER IV, individually
and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY N. BARBER
12 Capitol Street
Charleston, WV 25301
(304) 343-7676

Counsel for Respondents

BEST AVAILABLE COPY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's denial of petitioners' claim of qualified immunity, which can be resolved as a matter of law, is immediately appealable under the collateral order exception to 28 U.S.C. § 1291 enunciated in Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

2. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly established right of public employees under Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.*

---

*Pursuant to Rule 21.1(b) of the Rules of this Court, the following is a complete list of the parties in the underlying proceedings (identified as plaintiffs or defendants in the district

court, and as appellants or appellees in the court of appeals):

Plaintiffs/appellees . . .John M. Bever,
Clearyl Davis,
John E. Ellifritt,
Cecil Fling,
Francis D. Radcliff,
Robert W. Robinson,
Michael Shepher,
Larry Williams,
and Larry W. Griffin,

Defendants/appellants . . . . John D.
Rockefeller, IV,
Walter Gilbertson
and Charles L. Miller,

Defendants. . . . . John Gum
and Wilton Williams.

In addition to these parties, the United States of America appeared as amicus curiae in support of Governor Rockefeller's Petition for Rehearing in the court of appeals.

Furthermore, defendants/appellants Walter Gilbertson and Charles L. Miller are, by their separate counsel, filing a petition with this Court for a writ of certiorari with respect to their claims of immunity.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT	4
REASONS WHY WRIT SHOULD NOT ISSUE	22
CONCLUSION	58

TABLE OF AUTHORITIES

Bever v. Gilbertson, 724 F. 2d 1093 (4th Cir. 1983)..1, 24

Branti v. Finkel, 445 U.S. 507 (1980)..... 7

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)...2, 3, 22

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)..... 23

Evans v. Dillahunty, 711 F. 2d 828 (8th Cir. 1983)..... 51

Elrod v. Burns, 427 U.S. 347 (1976).....7, 50

Givhan v. Western Line Consol. School Dist., 439 U.S. (1979)..... 43

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 4

Jones v. Dodson, 727 F. 2d 1329 (4th Cir. 1984)..... 45

Krohn v. United States, No. 83-1839 (August 22, 1984 - 1st Cir.)..... 51

McSurely v. McClelland, 679 F. 2d 309 (D.C. Cir. 1982)..... 50

Miller v. Board of Education of County of Lincoln, 450 F. Supp. 106 (S.D. W.Va. 1978)..... 48

Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977)..... 42

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 23

Schever v. Rhodes, 416 U.S. 232 (1974) 8

Wren v. Jones, 635 F. 2d 1277 (7th Cir. 1980), cert. denied, 454 U.S. 832 (1981) 37

No. 83-2139

In the

SUPREME COURT OF THE UNITED STATES

October Term 1983

JOHN D. ROCKEFELLER IV, individually and as Governor of West Virginia,

Petitioner,

v.

JOHN M. BEVER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to the authority in Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court rules, John

Bever, et al, request that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

OPINIONS BELOW

The opinion of the court of appeals is reported as Bever vs. Gilbertson, 724 F.2d 1083 (4th Cir. 1983). However, the order denying petitioners' request for a rehearing with suggestion for rehearing en banc is not yet officially reported. The district court's opinion denying petitioners' motion for summary judgment is unpublished.

JURISDICTION

Petitioners depend for jurisdiction on the exception announced in Cohen vs.

Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) to the finality rule set out in 28 U.S.C. § 1291. Petitioners also claim jurisdiction to be based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents' claims, against which petitioner asserts qualified immunity, are brought under 42 U.S.C. §§ 1983 and 1985 and are based upon the First, Ninth and Fourteenth Amendments. The issue of appealability involves 28 U.S.C. § 1291. The question of employment authority in the West Virginia Department of Highways, which relates to the injunctive claims asserted against petitioner, is governed by W. Va. Code § 17-2A-4(1983). The texts of these constitutional statutory provisions are reprinted in Appendix

pages 87A-90A.

STATEMENT OF THE CASE

Petitioners seek review here of the refusal of the Fourth Circuit Court of Appeals to hear an appeal of the district court's denial of their motions for summary judgment based upon a claim of qualified immunity as outlined in Harlow vs. Fitzgerald, 457 U.S. 800 (1982). The court of appeals found it was without jurisdiction in the appeal since the interlocutory holding of the district court did not fall within the exceptions to the finality requirements of 28 U.S.C. § 1291 announced in Cohen vs. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949).

A. Respondents' claims and procedural history.

Respondents, all residents of

Doddridge County, West Virginia, are all former employees of the West Virginia Department of Highways who allege in their amended complaint, filed on March 28, 1983, that they were discharged by the petitioners in early and mid 1981 solely because of their political affiliation with the Republican Party.

Petitioner Rockefeller has been the Governor of West Virginia since January 1, 1977; Petitioner Miller was appointed by petitioner Rockefeller as his Commissioner of Highways in September, 1977; petitioner Gilbertson was appointed District Engineer for District 4 (which included Doddridge County) of the Department of Highways in November, 1977; defendant Gum was named (Doddridge) County Supervisor of the Department of Highways in July, 1977; and

defendant Williams was chairman of the Doddridge County Democratic Party executive committee throughout the setting of this action. All petitioners and defendants currently remain in the same positions as during the salient periods of 1981 recited in the pleadings.

Neither defendant Williams nor Gum is before this court. Gum was one of the summary movants but opted not to appeal the District Court's denial of his motion while Williams, not acting with official discretion, was not an immunity claimant.

These civil rights claims are stated in both the direct "knew or should have known" allegations as to petitioners, Rockefeller, Miller and Gilbertson as well as conspiracy claims as to all original defendants some of

whom are petitioners here. Further, the allegations charge petitioners had the power to prevent or aid in the prevention of the violation of respondents' rights but neglected or refused to act. The actions are founded in 42 USC §§1983 and 1985 with the predicate rights having been announced in Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980).[1]

Petitioners Rockefeller, Miller, Gilbertson and Gum filed answers denying

---

[1] Petitioners' brief states the instant case is one of nine cases pending on the same issues of political patronage firing under the Rockefeller Administration. A number of these cases do not share the immunity issues raised here. Some have contended that the "fiscal" cutback by Rockefeller was contrived to gain the dismissal of plaintiffs thereby disguising the actual political reasons for terminiation by an invented fiscal crisis.

the factual allegations of Respondents (that they were fired because they were Republicans) and asserting a number of affirmative defenses including the common law "absolute immunity or (Miller, Gilbertson and Gum claimed "and") qualified immunity or both" based upon their assertions their acts were protected from liability inasmuch as each was acting in his respective official capacity as a state official.

These defenses of immunity became the subject of separate motions for summary judgement. Although the motions were entitled to suggest assertions of "official immunity", the content of both briefs properly characterized the defense as "qualified immunity" as most recently defined by Scheuer vs. Rhodes, 446 U.S. 232 (1974) and refined in

Harlow vs. Fitzgerald, supra. Any claim of "absolute immunity" or the "and/or" combination of both absolute and qualified immunity raised alternatively in the responsive pleadings was abandoned.

As a portion of the motions for summary judgement petitioners claimed that respondents were "laid off" because of "budgetary constraints" and that if political affiliation played a role in the decision to select these appellees for "lay-off" it was not the "sole" reason. By virtue of the multiple reasons for the "layoff", according to the summary judgment movants, an undiluted Elrod-Branti firing was not applicable to the termination of Respondents thus rendering the state of the law as not "clearly established". Such a state

of the law, at the time of petitioners' action, would thereby shield movants from liability for damages when exercising discretionary functions under the auspices of Harlow. Thus petitioners asserted that in a budget-inspired cutback the selection of respondents for termination soley because of their political party affifilation was constitutionally acceptable.

On July 21, 1983, the district court[2] denied the respective motions for summary judgment by a written opinion. App. p. 44-A. The court found that the law was "clearly

---

[2] Rockefeller's counsel asserted, in the memorandum in support of summary motion: "A literal reading of Elrod and Branti stongly suggests that the discharge of a public employee for political reasons is permissible, so long as it is not the sole

established" by virtue of the Elrod and Branti holdings and prohibited the

---

justification." "Given these facts (that plaintiffs' terminations were inevitable because of "fiscal necessity") and presupposing even that the selection of the plaintiffs for termination was politically tainted, the question thus arises as to the nature of the constitutional right allegedly abridged in the cases and, indeed, whether a constitutional right is implicated in these cases at all".

selection of respondents for dismissal because of their political affiliation regardless of the predicate basis for the decision to terminate "someone".

In the same opinion, the district court ruled on a motion which raised an issue repeatedly re-asserted in petitioners' briefs here: That petitioners, by their own self-serving affidavits, had no role in the selection of respondents for discharge whether or not political considerations were involved in that decision.

The district court found that such affirmative direct involvement was not a necessary ingredient in deciding the issue of § 1983 culpability as charged in the pleadings: "Defendants Gilbertson, Miller and Rockefeller challenge the complaint as insufficient

based on plaintiffs' alleged failure to aver an "affirmative link" indicating some personal involvement of these defendants in the acts complained of (selection for termination because of political party affiliation)." On this issue the district court found: "In the Fourth Circuit, such an affirmative link may be demonstrated through proof that a defendant 'knew or should have known' of the challenged practice, but evidenced deliberate indifference to plaintiffs' constitutional rights." App. p. 68A.

Further, the district court found that the affidavits and exhibits filed with the summary motion went "to the merits of the case" in an attempt to show petitioners' "good faith had been conclusively established, and that the

court may find as a matter of law that they are entited to judgment". Taken as a summary motion apart from the qualified immunity issue, the court denied motion since the record revealed genuine issues of fact.

After the district court denied requests for certification for immediate appeals as interlocutory orders under 28 U.S.C. 1292(b), petitioners filed notice of appeal and eventually secured, from Judge K. K. Hall of the Fourth Circuit, a stay of the impending trial as well as his finding that the district court's denial of the summary motion was an appealable order under Cohen.

The majority of a panel in the court of appeals reversed the single judge's decision and Judge Hall authored the dissent discussed so prominently in petitioners' briefs. An equally divided

vote of active justices in the circuit court caused the panel decision to stand and prompted this writ.

The court of appeals panel, in finding it had no jurisdiction under the Cohen exception, addressed only two of the four requisites set out for the characterization of the interlocutory order as appealable in Cohen. Since all four requirements must be present the failure of two defeated the Cohen application. Petitioners' brief somehow concludes that by not specifically ruling on two of the issues, they must have been decided in favor of petitioners.

The two Cohen ingredients were that since a trial on the merits must decide the issues for injunctive relief, which require the same proof as the damage claim, the qualified immunity

claim cannot save petitioners from a trial. But most importantly, the circuit court found also that the state of the law applicable to firing on the sole basis of party affiliation was not "unsettled" to a reasonable person when respondents were terminated.

Finding those two impediments to the Cohen exception, the court of appeals had to proceed no further to deny jurisdiction under the finality rule.

B. State of the record below.

Contrary to the assertions of petitioners' briefs, the record before the district court in deciding the motion for summary judgement included extensive discovery in the form of depositions and interrogatories. The court below considered this record, the affidavits of petitioners and argument

of counsel in deciding the motions.

Some specific recitations there include the following.

James Bowen, an Assistant Superintendent of the Doddridge County Unit of the West Virginia Department of Highways, testified in his evidentiary deposition that he personally informed Rockefeller of the harassment of employees affiliated with the Republican party and he further discussed that problem with one of Rockefeller's confidential aides. Bowen also testified that his father-in-law, Roncil Burton, now deceased, the then County Democratic Executive Committee Chairman in Doddridge County, met with Rockefeller and informed him of politically motivated harassment of Republican employees by defendant Gum. Bowen gave the same information to Miller and Gil-

bertson. Moreover, Gilbertson disclosed in his deposition that Department of Highways records reflect political clash causing defendant Gum to retaliate against respondent Bever by suspending and demoting him from his position.

Another deponent, Michael O' Brian, who is merely a private citizen of Doddridge County and unaffiliated with any party in this action, testified that he attended a public meeting conducted by Rockefeller at a small college during which he told Rockefeller that politics controlled the jobs and the roads in Doddridge County. Rockefeller refused to discuss that issue with him and summarily dismissed the complaint as a private matter. O'Brian then tried to telephone Rockefeller by placing a long distance call from the Department of Highways office in Doddridge County. He

was then informed of criminal prosecution for making the call and incurring the cost thereof on a state telephone bill.

Larry Swann, a member of the West Virginia legislature, and in fact, the leader of the minority Republican party testified on deposition that together with the same Roncil Burton he met with Governor Rockefeller at his office to tell him of the politically motivated harassment of Republican employees in Doddridge County by defendant Gum. Swann also testified that membership in the Doddridge County Democratic Executive Committee was necessary to obtain employment with the Department of Highways.

Rockefeller was named as a defendant in three previous civil rights actions alleging violations of the Elrod vs.

Burns in the Department of Highways. Each was filed and personal service was effected on Rockefeller as Court records indicated before the 1981 terminations occurred.

Yet, Rockefeller testified that he was not informed of the filing of these suits, and was not aware of the claims made until late 1981 when this deposition was taken in connection with one of those cases, but he had no office procedure to provide him with the substance of any suit.

Rockefeller also received other information from reliable individuals concerning terminations caused by political affiliation. One letter from a partner in the Charleston, West Virginia law firm which included Rockefeller's then counsel scolded that the political basis for firing bottom-

level employees was continuing.

Rockefeller responded to the Elrod decision by issuance of an executive order in November, 1978, and took no further acion to remedy politically motivated employment discrimination against Republicans which has occurred subsequent to that executive order and resulting in civil rights actions and letters to be written to the Governor concerning that discriminatory treatment.

Additionally, Department of Highway records developed in the discovery indicated that the Department's Equal Employment Opportunity Affairs Officer stated at meetings that the termination of employees in the 1981 terminations were politically motivated.

In addition to the above-described factual evidence, there is voluminous

factual evidence directed at defendant Gum, who made statements to plaintiffs and non-party witnesses of his animosity toward Republicans and his intention to terminate Republican affiliated employees. Further the plaintiffs have developed significant statistical evidence, as testified to on deposition by Dennis P. Bradly, Ph.D., who as a qualified expert witness in statistical analysis data in combined form and has determined that the termination rate of Republicans affiliated employees was 3.9 standard deviations higher than expected, a figure of significance, coupled with other direct testimony, in the determination of patronage dismissals.

REASONS WHY THE WRIT SHOULD NOT ISSUE.

I. The directives of the Cohen

case, allowing an appeal of of certain specified interlocutory orders as an exception to the finality rule, have not been met.

Petitioners allege that the denial by a clearly interlocutory order in the district court of their motions for summary judgment based upon the qualified immunity from damage claims, available to them as state officials, should be appealable here under the auspices of Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and restated in Coopers & Lybrand Livesay, 437 U.S. 463 (1978). As recited in Nixon vs. Fitzgerald, 457 U.S. 731 (1982) the Cohen "collateral order" doctrine is:

". . . a small class of inter-

> locutory orders are immediately appealable to the courts of appeals. As defined by Cohen, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgement." As an additional requirement, Cohen established that a collateral appeal of an interlocutory order must "present a serious and unsettled question".

The Fourth Circuit Court of Appeals found the application of the Cohen rule failed in two of its four directives. Bever vs. Gilbertson, 724 F.2d 1083 (4th Cir. 1983). First, the rationale of the requirement of that interlocutory order must have decided an issue which would be "effectively unreivewable on appeal from final judgment". Stated conversely, if the issue is not appealable before final judgement any decision by an appellate body would be ineffective to accomplish the very

end of the asserted right - to prevent a trial at all.

Secondly, the court of appeals found that the decision of the district court did not involve a "serious and unsettled" question.

With two prerequisites of the Cohen rule unavailable to petitioners, the court of appeals did not address the remaining issues.

In deciding the first element, the court of appeals noted that the present action involved a claim for prospective injuctive relief against petitioners in their respective capacities as public officials requesting reinstatement and the prohibition of petitioners "from further violating the right and immunities guaranteed to (respondents) under the constitution". The redefining of qualified immunity in Harlow vs.

Fitzgerald, 457 U.S. 800 (1982) specifically limited qualifed immunity to "damage" claims and expressed "no view as to the condition in which injunctive or declarative relief might be available'. Thus the asserted immunity could not protect petitioners from a trial on the merits involving the very same substantive issues as in the proceeding for damages in petitioners individual capacities from which protection is sought, those issues involve the proof of patronage dismissal in violation of Elrod-Branti. Only the requested relief varied - damages arguably protected by qualified immunity and injunctive relief clearly not so protected.

Thus the court of appeals found that the prevention of petitioners participating in a trial on the merits

could not be effectuated by Harlow qualified immunity, and, thus, a denial by the district court of summary relief on that issue would not be rendered "effectively unreviewable on appeal from a final judgement". Since the trial of the injunctive relief would "hale" petitioners into court anyway, the issue of qualified immunity to damage claims aggainst the same persons in different hats could wait until final judgement.

The court found: "The trial must proceed in any event, and the question of qualified immunity is readily subject to appellate review after final judgement". App. p. 16A. Petitioners quote Judge Hall's dissent as raising the specter of qualifed immunity being effectively gutted by the majority's reasoning because artful pleaders will simply "tack on" a prayer for

injunctive relief thereby defeating the vitality of the immunity bar. App. p. 35A. The dissent apparently suggests the remedy that injunctive relief be abolished at least in § 1983 cases. There are sanctions to a pleader who would participate in such a "pernicious practice" can be accomplished less intrusively than the wholesale abolition of the jurisprudence supporting injunctive relief. Such a pleader must comport with Rule 11 of the Rules of Civil Procedure and its internal remedies, but, more importantly, the district court can inspect the basis for the injunctive relief as accomplished here, and dismiss such claims that are either facially without factual merit or that require relief not available against individual In the present case, the

district court found "all" of the petitioners to be proper parties to the injunctive claim. App. p.70A.

The court of appeals responded to the protestations in the dissent that only petitioner Miller should be a party defendant to the injunctive claim by pointing out that although petitioner Miller is specifically given authority in matters of employment in the Highways Department by statute, both he and his subordinate, petitioner Gilbertson, are in turn servants "at the will and pleasure" of petitioner Rockefeller. Thus, any injuctive relief to effectuate respondents asserted rights must include <u>all</u> petitioners. App. p. 11A N.1.

Thus the "effectively unreviewable on appeal" element of Cohen could not be met in the instant case. To alter that

element in the present case, this court must fashion some rememdy that would at once allow a trial with proper parties to an injunctive claim which shares identical issues with a damage claim which is to be prohibited by objective, good-faith, qualified immunity. An answer to such a dilemma not only does not seem ready or desireable.

Petitioners here could simply answer that having given themselves to public life they need never fear a court appearance for blatant wrong doing. That alteration certainly cannot fit this case.

The second element of the Cohen rule found to be wanting by the court of appeals was the failure of the interlocutory order to provide a "serious and unsettled question". App.p. 19A.

The court found that in 1981

respondents were clearly protected by Elrod-Branti from termination based solely upon political affiliation. App. p. 20A. The district court had easily reached the same conclusion. App. p. 73A. Thus the state of the law is not "unsettled" in 1981 (or now for that matter).

The Harlow case segmented the "good faith" qualified immunity into the "objective" element - whether the law applicable to the conduct was "clearly established" to a "reasonable person" at the time of the act - which standard, being devoid of any factual predicate and clearly an analysis of the state of the law at a given time, is given to summary decision.

Contrary to petitioners'[3] claim, the "subjective" element of qualified

---

[3] Capsulized, the Harlow qualified immunity holding finds: "For executive

(footnote 3 continued)

officials in general, however, our cases make plain that qualified immunity represents the norm. In (Scheuer) we acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. Nonetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity" (S.Ct. p. 2733). Further developing qualified immunity, the court noted two "aspects" as "objective elements" which it says "involves a presumptive knowledge of and respect for basic unquestioned constitutional rights"; and "the subjective component refers to 'permissible intentions'". Noting the desirability of disposing of the defense by summary judgement and the impediment to that avenue provided by the "subjective component", the court held that the "objective test" will measure the validity of the defense on even a pre-discovery basis (S.Ct. p. 2738-2739).

"We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". (cites omitted)

* * *

"Reliance on the objective reasonableness of an official's conduct as measured by reference to clearly established law, should avoid excessive disruption of government and permit the

(footnote 3 continued)

resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonable competent public official would know the law was governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily an objective factor."

immunity was not eleminated by Harlow since it involves a factual determination as to whether an official, as a not the "reasonable man", in fact, "knew or should have known the relevant legal standard".

In contending that the Cohen "serious and unsettled" requirement have been met here, petitioners claim first that since petitioners allege that "budgetary" considerations led to their decision to terminate some employees, they were entitled to select respondents for termination from the pool of employees based upon political affiliations since, from their perspective, it was not the "sole" consideration in the termination. Such contentions have punctuated petitioners'

briefs since the appealability of the summary denial first appeared to offer a pre-trial appeal. Interestingly, none of the petitioners have ever claimed in their affidavits or depositions that the directives of Elrod-Branti were not fully known and specifically applied here. In fact petitioner Rockefeller specifically acknowledged in his deposition (taken after the ban on discovery as per Harlow) that "even" allowing political affiliation to "play any part at all in determining who is to be laid off or terminated at any time" was "not to be considered proper".

All petitioners have similarly claimed adherence to Elrod-Branti as the district court found in the record below. App. p. 74A. Thus all had actual knowledge of the legal impediments to using political affiliation as an

ingredient in selecting respondents for termination. Only the allegations of counsel in brief are the contrary.

With actual knowledge, petitioners can't even escape to the "reasonable man" refuge. As outlined in the first concurring opinion in Harlow by Justice Brennan and joined by Justice Blackmun and Justice Marshall and the majority writer, Justice Powell:

> "I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his ctions. Ante, at 2737, 2739. This standard would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board" to all "government officials performing discretionary functions."

Like the dissent in the court of appeals, petitioners cite Wren vs. Jones, 635 F.2d 1277 cert. denied as being in petitioner Rockefeller's words "far more akin to petitioners' situation than either Elrod or Branti". In fact he takes the somewhat curious position that "contrary to what the Fourth Circuit suggested in its opinion below, this is simply not an Elrod or a Branti case." This statement apparently stems from a preception some factual disparity of the present case from those holdings and ignore the wide-sweeping constitutional interpretation of those decisions.

The Court of appeals decision dismissed the dissent's reliance on Wren as being "nothing like" the present case since political affiliation was not

even a factor.[4]

As the only circuit court case cited in support of this threshold "unsettled" proposition, Wren is a per curiam opinion which admits by its own language to being "unique" (p. 1283).[5] Note may be taken as to its date and unsuccessful appeal in determining its applicability to petitioners' assertions of an unclear and unsettled state of the law when they fired appellees in February and June, 1981.

As a supposed fiscal "independent justification" case which is to unsettle Elrod-Branti, Wren requires close scrutiny for its application to the

---

[4] In briefs below petitioners cited many cases for this proposition none of which stood for the "independent justification" theory proposed by petitioners and all decided after the acts complained of" here.

[5] The opinion appeared in the advance

instant case. From a full trial record, the facts revealed are that, as per Illinois tradition, when Democrat Governor Shapiro prepared to leave office in November, 1968, he extended civil service coverage to the Department of highways and the Department of Mental Health insure his patronage democrats would be job secure when the Republican governor-elect Oglivie took office in January, 1969. However, when Oglivie took office he "expunged" Shapiro's civil service maneuver, and replaced the Shapiro democrats with Oglivie republicans. Twenty-five of those replaced by Ogivie filed a §1983 action entitled the Bradley case. While this case was pending, in November 1972

---

sheets February 23, 1981 and in the bound volume May 3, 1981. The denial of cert. dated March 3, 1981, appeared in the advance sheets December 15, 1981, and has not yet been published in a bound volume.

Oglivie tried to freeze his Republican patronage employees by the same civil service declaration tried by his predecessor. The reason, of course, was that a Democrat, Walker, had been elected governor and was due to take office in January, 1973. With Democrat Walker in office, the Bradley case was tried and plaintiffs there were ordered reinstated in April, 1973. An order entered in May, 1973 threatened contempt for failure to abide by the opinion's directive of reinstatement.

Shortly thereafter, "financial restrictions" prompted the layoff of 540 highway workers. So, highway officials were "confronted with the specter of having 50 employees to do work formerly performed by 25 employees" during a time others were being laid off because of fiscal short-fall (the current euphemism

for being broke).

With that the highway officials devised the means of "selecting those employees for 'lay-off'" (p. 1280). All of the workers in both the Highway Department and the Mental Health Department were Oglivie-placed Republicans including Wren and the other plaintiffs. Therefore there was no element of partisan selection (totally unlike the instant case) as noted (p. 1286):

> "The fact that all potentially affected employees were Republicans means that the Wren plaintiff's political association was of no consequence. . ."

Even without party affiliation a factor, the "selection" process for the "lay-off" implementation of the Bradley reinstatement order was objective. Those workers who actually had replaced the Bradley workers were first

identified - this produced fifteen slots. When those who had displaced workers who had actually replaced Bradley employees were identified, this produced another six slots in the Highway Department the remaining four slots "could not be identified precisely (therefore) persons were laid off on a random basis". The single employee in the Mental Health Department was selected by means stated as "the last person hired was laid-off" (p. 1280).

Modestly characterized as "unique" and "unusual" the district court there addressed the facts of this sort of double Elrod case by applying the procedure set out in Mt. Healthy Board of Education vs. Doyle, 429 U.S. 274 (1977) to a full trial (p. 1283) and ordered reinstatement of the Wren plaintiffs with damages assessed.[6]

---

[6] Restating the Mt. Healthy holding,

(footnote 6 continued)

the district court here stated: "The Mt. Healthy test, reaffirmed in Givhan vs. Western Line Consol. School Dist., 439 U.S. (1979), provides that, once plaintiff has satisfied his prima facie burden of demonstrating (1) that his conduct was constitutionally protected, and (2) that his conduct was an "unsubstantial" or "motivating" factor in the decision to terminate him, then defendant must prove by a preponderance of the evidence that the same employment decision would have been reached as to plaintiff even in the absence of the protected conduct, i.e., that plaintiffs' political affiliation was not the "sole cause" of his termination."

> "Under Givhan (first phase) the initial burden is upon plaintiffs to show that their conduct was constitutionally protected. Plaintiffs must next establish that this conduct was a "substantial factor" or a "motivating factor" in defendants' decision to discharge them from the Highway Authority."
>
> "If that is proven, (second phase) the defendants have the burden to show by a preponderance of the evidence that they would have reached the same decision notwithstanding the protected conduct. If the plaintiffs are to recover, the court (or jury) must expressly find that plaintiffs would not have been discharged "but for" the constitutionally immunized activity."

On review the Wren panel again applied the Mt. HealthyGivhan two-phased burden shifting rule (p. 1285-1286):

The Court justifiably found that upon review of all the evidence (not on pretrial hypothesized facts as here) that the Wren plaintiffs had not satisfied that portion of the first phase demanding the prima facie burden that "political affiliation was the motivating factor in their discharge". (p. 1286)

Yet, as it is apparently the habit of courts in these §1983 cases, the court went on to "assume arguendo, that plaintiffs have satisfied the first part of the Mt. Healthy test, we find that the defendants have, by a preponderance of the evidence, established that fiscal restraints required a reduction in the affected units equivalent to the number

of reinstated Bradley employees . . ."

This holding, then, instead of revealing the state of the Elrod-Branti holdings as being not "clearly established" by the introduction of an "independent justification", clearly and specifically holds that the law clearly placed that "independent justification" in the defendants' quiver for use in rebutting plaintiffs' prima facie case if that initial burden is met.

Petitioners also cite Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) for the proposition that the Elrod-Branti dictates are "neither clear nor clearly established", and, surely, "unsettled" for Cohen. General language is quoted indicating that in employee discharge issues involving "first amendement" expressions

"controlling doctrine - both substantive and procedural - is still evolving and by no means yet authortatively settled." However, any reading of the specifics of the decision reveals a clear state of the law which not only acknowledges Elrod-Branti rights but confirms that the procedure appropraite for determining any challenge to the "sole" cause issue is the Mt. Healthy matrix for the reception and sorting of facts. The decision first announces the undiluted right announced in Elrod-Branti, then the method of resolution of "unrelated" reasons for discharge:

> "Third, neither may a public employee be discharged solely because of the employee's political party affiliation, unless the employer can show that affiliation with the employer's party is essential to the employee's effectiveness in carrying out the responsibilities of the position held. Citation to Elrod and Branti.
>
> Fourth, notwithstanding proof

(or concession) that a public employee's discharge was based at least in part upon over expressive conduct, party affiliation, or both, an employer may yet avoid liability for violation of protected first amendment rights by proving that the

discharge would have ben made in any event for reasons unrelated to any exercise of protected first amendment rights. The burden to prove this avoidance defense is upon the employer." (citation omitted).

A footnote to this passage focuses even more clearly:

"Although the impermissible motive in Mt. Healthy itself was overt expressive conduct, we agree with those courts that have applied the principle as well to party affiliation cases. The Mt. Healthy procedure for sorting out mixed motives fairly accommodates the reality that in practically any party affiliation discharge situation some unrelated reason may also be advanced by the employer. By applying the Mt. Healthy proof scheme, the critical issue whether a discharge was solely for party affiliation reasons can be fairly addressed. If the employer does not carry its burden of providing that the discharge would have occurred irrespective of party affiliation, it can safely be taken that party affiliation was effectively the only reason." (citations omitted)

Jones then properly places a challenge to the Elrod-Branti "sole" cause in the proper role - as an ingredient in the defendant's proof scheme under Mt. Healthy - not as emasculating a clearly established right. In West Virginia the district court below in the present case had found the exact same role of a so-called independent justification in Miller -----vs. Board of Education of County of Lincoln, 450 F. Supp. 106 (S.D. W.Va 1978).

The "serious and unsettled" element of Cohen has not been met here. Instead it has been shown that it is "settled" that the state of the law was "clearly established" in early and mid 1981 that the sole basis for discharging a public, non-policy making employee could not be political affiliation. The court

of appeals - here properly cast the supposed "budgetary reasons" for the decision to terminate some employees as being "only a backdrop. It did not identify those employees to be terminated or those to be retained. It only set the stage for those specific employment decisions which would identify those employees who were released and would effect their actual terminations. The Elrod-Branti principle fully protected all of the lower echelon employees of the Department as their superiors approached the task of implementation of the reduction in force". App.p. 20A-21A.

This recitation of the lucid application of simple constitutional rights is not repelled by any decision

or force of reason advanced by petitioners. They are reduced to charging that respondents' claims are "unsubstantial" from a "factual standpoint" on "this alone ought to be sufficient to warrant a conclusion that petitioners' appeal presents a serious and unsettled question". (Rockefeller brief p. 18). Having failed the showing of "serious and unsettled" petitioners invite a factual analysis not contemplated by either the Cohen element or the Harlow objective "good faith" qualified immunity, an issue discussed below in this brief.

As stated by petitioners, McSurely vs. McCelland, 679 F.2d 309 (D.C. Cir. 1982) found that Harlow had "jettisoned the subjective, fact oriented element of qualified immunity and vest the doctrine in terms of objective good

faith."

Actually the subjective element was simply delayed to a trial by the Harlow holding; nevertheless, McSurely held that this new objective good faith" qualified immunity was on a par with absolute immunity which has been repeatedly held immediately appealable. No discussion was had as to the elements of Cohen so an analysis of those factors is unavailable. Evans vs. Dillahunty, 711 F.2d 828 (8th Cir. 1983) is cited for added strength of another circuit to the McSurely proposition, but that opinion rejected McSurely and found "an evidentiary showing" was necessary if the facts are in dispute - a situtation clearly not applicable to the instant case. Since petitioners' brief was filed Krohn vs. United States, No. 83-1839 (August 22, 1984 - 1st Cir.) has followed the McSurely holding.

These cases simply conlude that the qualified immunity is immediately appealable in various circumstances, and base that on no holdings or rationale from this court.

II. Whether the approval of a reduction-in-force in state government for valid budgetary reasons contravenes any clearly estaablished right of public employees under Elrod vs. Burns, 427 U.S. 347 (1976) and Branti vs. Finkel, 445 U.S. 507 (1980), not to be terminated solely on the basis of politics.

This issue suggested by petitioners would require a finding of fact here and a disposition of this case on the merits. Such an exercise is starkly

at odds with the "objective" standard for qualified immunity set out in Harlow as well as the second element of Cohen. This element prohibits immediate appeal of an issue that is not "separate from the merits of the action". The whole point of the Harlow objective test is the avoidance of disputed questions of fact which cannot be decided in a summary judgment motion. Harlow p. 900.

Petitioner Rockefeller typifies this misunderstanding of the elementary rules of Harlow and Cohen as well as Rule 56 of the Rules of Civil Procedure in insisting that: "The test for determining petitioners' entitlement to immunity is not simply whether respondents, as public employees, had certain identifiable constitutional rights in 1981, such as the right not

to be fired based solely on politics. Rather, the test is whethr petitioners' conduct can be said to have violated or abridged any such clearly established rights of these respondents".
(petitioner Rockefeller's brief p. 21)

Both briefs pronounce the innocence of petitioners of any role in patronage dismissals on every page, invariably citing only their affidavits filed in support of their summary motions below and ignoring the remainder of the record.[7]

"Motivation" is somehow found to be an ingredient of Harlow's objective qualified immunity. (petitioner Rockefeller's brief p. 2)

Harlow anticipted the determination of the state of the law revealed to a

---

[7] The terms of Rule 56 itself require

reasonable person[8] at a time when "alleged violations" occurred. See Justice Brennan's concurring opinion joined by Justice Marshall and Justice Blackmun as well as the majority writer, Justice Powell. Harlow p. 813.

In order to effectuate the objective standard of Harlow no competency factual allegations could be considered as petitioners urge. Instead the inquiry must be to state of the law applied to the facts alleged. It must be assumed that the facts would be in contest

---

an analysis of "the pleadings, depositions, answers to interrogatories and admissions on file", and the court must look at this "record in the light most favorable to the party opposing the motion. See Harlow p. 900, N. 26.

---

[8] Or, as here, actually known to petitioners.

during a trial but the purpose of Harlow's objective appraisal is to avoid the variable of uncertain factual setting. Pled allegations then become the factual predicate to assess the immunity issue.

The Court of appeals in the present case recognized this proposition in stating: If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithful-ness to their jobs but solely on the basis of their political affiliations the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle. App. p. 22A.

The Court of appeals in the present case recognized this proposition in stating: If, in the implementation of a reduction in force, those employees to be released are selected not on the basis of the quality of their work, their productivity or their faithfulness to their jobs but solely on the basis of their political affiliations the Elrod-Branti principle is clearly applicable. The plaintiffs' allegations bring them readily within the principle. App. p. 22A. (emphasis supplied)

CONCLUSION

Much of petitioners' brief deals with the social costs and financial burdens to public officials in defending actions against them, and the necessity of curbing the practice.

Little has been said about the costs to the lowest order of laborers in the West Virginia Department of Highways who lost their jobs because they exercised a basic freedom. They have not benefitted by a panel of lawyers from both the public and private sector using the court system as a tactical tool to delay answering the allegations presented before a trial court and jury.

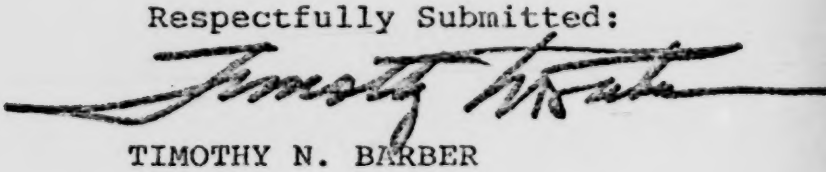
These social costs have all been incurred because petitioners wish to delay a trial. That fact was recognized by the court of appeals below (App. p.

13A-14A.

In addition to decrying the imposition of law suits on public officials, Harlow also found that damage actions against high officials are "an important means of indicating constitutional guarantees".

The respondents' rights here were clearly established and their redress should not wait for another series of hearings and appeals for the various levels of the judicary to pass on what is clearly "settled".

Respectfully Submitted:



TIMOTHY N. BARBER